Filed 5/7/13 In re R.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re R.M., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. M.A., Defendant and Appellant.	E056709 (Super.Ct.No. SWJ003026) OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant M.A. (Mother) appeals the order denying her petition under Welfare and Institutions Code[1] section 388 on the grounds the juvenile court erred in its decision. We disagree and affirm.

I. PROCEDURAL BACKGROUND AND FACTS

The Department of Public Social Services (the Department) received a referral alleging general neglect due to a family residing in a fifth wheel trailer on the property of a scrap yard. Deputies investigated and found methamphetamine and a pipe on R.M., Sr. (Father) and both parents under the influence of a controlled substance; the parents were arrested. On May 6, 2011, the Department initiated dependency proceedings pursuant to Section 300, subdivisions (b) and (g), on behalf of the parents' two-year-old, R.M., Jr. (the child). According to the petition, the residence was uninhabitable, the parents had unresolved histories of abusing methamphetamine, and they neglected the child. Both parents were incarcerated.

According to the detention report, in 2004 Mother had lost her parental rights to another child due to her substance abuse issues. Both parents admitted using methamphetamine. Father was not married to Mother and thus was identified as an alleged father. A detention hearing was held on May 9, wherein the court detained the child and ordered services and supervised visitation for both parents. Father was ordered to complete a "Parental Notification of Indian Status (form ICWA-020)" and submit it to the court.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

According to the jurisdiction/disposition report filed on June 3, 2011, the social worker recommended that both parents be denied reunification services. While Father stated that he may have Cherokee ancestry, he is not registered with a tribe and is unaware if there are any family members who are registered. Both parents confirmed that Father is the father of the child. Father had an active criminal case involving felony burglary dated March 25, 2011. Both parents preferred that the child be placed with the paternal grandparents. The child was described as experiencing "severe developmental delays, including complete speech deficit." The social worker advised both parents of their option to relinquish their rights and free the child for adoption, but both refused. According to the social worker, section 361.5, subdivision (b)(11) and (13) applied, because Mother had failed to reunify with another child for whom her parental rights were terminated and Father had failed to benefit from prior drug treatment services.

Mother enrolled in the 16-week Riverside County Department of Mental Health substance abuse outpatient treatment program on June 1, 2011. The program included individual and group counseling, random drug testing, and other personal growth, family addiction, and criminality classes. On June 2, the Cherokee Nation informed the Department that the child would not be "considered an 'Indian [child]' in relationship to the Cherokee Nation . . . ."

A contested jurisdiction/disposition hearing was held on June 21, 2011. The court found the allegations in the petition true, with the exception of allegation (g)(1), adjudged the child to be a dependent of the court, removed physical custody of him from both

parents, allowed supervised visitation to continue, denied reunification services, and set a section 366.26 hearing.

According to the section 366.26 selection and implementation report filed on October 4, 2011, the child was diagnosed with autism and speech disorder. Mother had visited with him; however, Father had not because he was incarcerated and the child could "not handle small enclosed places." The Department recommended adoption as the permanent plan.

The contested selection and implementation hearing was continued a few times. The addendum reports filed on June 7 and 11, and July 9, 2012, continued to recommend adoption as the permanent plan.

Mother filed a section 388 petition on April 25, 2012, requesting that the section 366.26 hearing be vacated and that she be granted six months of reunification services. She alleged that she had completed a substance abuse treatment program with an excellent progress report; she had tested clean over 20 times; she had completed parenting classes; and she had continued in family preservation court. She had lived in a sober living home since June 1, 2011, and had received a letter of recommendation from the manager that she followed the rules, was attending college, and had a job. Mother claimed it would be in the child's best interest to provide her with six months of reunification services because she had a strong bond with him.

At the hearing on July 12, 2012, Mother's counsel pointed out the significant progress Mother had made on a case plan despite the fact that she was not provided with reunification services. Counsel argued that Mother had made a substantial change in her

circumstances, including sober living (38 clean tests), attending college, glowing reports from care providers, support groups and the County of Mental Health, and consistent appropriate visitation. Counsel noted the child had been placed 15 days ago in a prospective adoptive home and reiterated that Mother had "worked a year on her case plan," and that she had "worked it a year on her own, with no assistance from the Department." In response, the Department pointed out that Mother was completing "criminal-court-ordered programs." She had a 25-year drug use history and four children, none of whom she had raised. She was getting "a lot of support from her program, from sober living . . . ." The child needed stability and a lot of attention. While Mother was improving, she had yet to demonstrate that she could take care of her child. Father's counsel supported Mother's request. Mother's counsel reiterated that all Mother was asking for was "the opportunity to try."

After considering the evidence, the juvenile court commended Mother for changing her life; however, it could not find a change of circumstances sufficient to justify modifying or changing the current court order. Recognizing that the court did not need to reach the issue of best interest, the court noted it would not be in the best interest of the child "to attempt to re-unify . . . with . . . [M]other at this time." Mother appeals.

II. DENIAL OF SECTION 388 PETITION

Mother contends the juvenile court erred in denying her section 388 petition. Specifically, she contends she "had completely changed her circumstances." Regarding the child's best interests, she claims that she had consistently visited with him; however, given his autism it was difficult to assess his bond to her. She further points out that he

had only recently been placed in an adoptive home, and there "was no way to know how the placement would work out less [th]an a month later at the hearing on [her] section 388 petition."

Section 388 provides that the juvenile court may, in its discretion, modify a prior order on the request of any interested person, if the court finds both (1) new evidence or a material change in circumstances justifying modification of the order, and (2) that the requested modification would be in the child's best interests. (§ 388, subd. (a).) A person filing a section 388 petition has the burden to show by a preponderance of the evidence that there is new evidence or there are changed circumstances which make modification of a prior order in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

When a party having the burden of proof on an issue challenges a finding that reflects the trier of fact's rejection of that party's evidence, "the question for a reviewing court becomes whether the evidence *compels* a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support [the] finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528, italics added.) Stated another way, Mother's challenge to the juvenile court's finding that no change in circumstance had occurred amounts to a contention that the "undisputed facts lead to only one conclusion" (*id.* at p. 1529; see also *In re A.A.* (2012) 203 Cal.App.4th 597, 612 [Fourth Dist., Div. Two]), i.e., that a change in circumstances *did* occur.

Mother contends she met her burden of proving changed circumstances, because by the time of the hearing, she had been living in a clean, appropriate sober living residence where she had visits with the child for over a year; she had participated in a rigorous, court-approved treatment program for over a year; she had never faltered in her sobriety or her commitment to changing her life; she was enrolled in school; she completed parenting and other classes; she had been working diligently during the time and had tested negative for all controlled substances for over a year; and she was self-supporting and 100 percent compliant in her treatment program as of June 14, 2012. She contends, in effect, that this evidence addressed all of the court's prior concerns.

While the evidence demonstrates that Mother's circumstances were changing, these changes must be viewed in light of Mother's 25-year history of methamphetamine use and relapses. Mother admitted she had not been using drugs in 2005 but then resumed using in 2007. When she was interviewed in May 2011, she stated that she had "'just started using again.'" Her most recent participation in a drug program was compulsory. If she failed she would return to jail. Mother was living in a controlled environment. There was no evidence of how she would respond once she was left to her own devices. While she had been studying autism, her ability to care for an autistic child was questionable. The juvenile court correctly observed that Mother was in the process of changing, but had not yet showed changed circumstances.

Based on the totality of the evidence, we conclude that Mother failed to demonstrate changed circumstances which mandated a finding that reinstating reunification services for her was in the child's best interests. Accordingly, Mother's

challenge to the court's ruling on her section 388 petition fails. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

III. DISPOSITION

The order denying Mother's section 388 petition is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

RICHLI
J.